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RECORD AND BRIEFS

No. 16-1466

IN THE
Supreme Court of the United States

MARK JANUS,
Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31

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QUESTION PRESENTED

Whether *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which this Court has repeatedly reaffirmed and relied upon and which forms the basis for public-sector "agency shop" arrangements in States and localities across the United States, should be overruled.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT 1

REASONS FOR DENYING THE PETITION 11

I. THIS COURT LACKS JURISDICTION TO DECIDE THE QUESTION PRESENTED 13

II. *ABOOD* WAS CORRECTLY DECIDED, AND FURTHER REVIEW IS UNWARRANTED 17

III. THIS IS AN UNSUITABLE VEHICLE FOR RECONSIDERING *ABOOD* IN ANY EVENT 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) ..... *passim*

Berkemer v. McCarty, 468 U.S. 420 (1984) 5

Board of Cnty. Comm'rs v. Umbehr, 518 U.S. 668 (1996) 23

Board of Regents v. Southworth, 529 U.S. 217 (2000) 4, 20

Bragdon v. Abbott, 524 U.S. 624 (1998) 16, 17

Brooks v. Walls, 279 F.3d 518 (7th Cir. 2002) 17

Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886 (1961) 18

Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) 4, 7, 18

Davenport v. Washington Educ. Ass'n, 551 U.S. 177 (2007) 4-5, 18

Disability Advocates, Inc. v. New York Coal. for Quality Assisted Living, Inc., 675 F.3d 149 (2d Cir. 2012) 13, 16

Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435 (1984) 4

Engquist v. Oregon Dep't of Agric., 553 U.S. 591 (2008) 18

Friedrichs v. California Teachers Ass'n:

136 S. Ct. 1083 (2016) 5, 21

136 S. Ct. 2545 (2016) 5

Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997) 20

Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567 (2004) 14

Harris v. Quinn, 134 S. Ct. 2618 (2014) 5, 21, 22

Hofheimer v. McIntee, 179 F.2d 789 (7th Cir. 1950).....10, 17

Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005) 4, 20

Jones v. United States, 527 U.S. 373 (1999) 5

Joseph v. United States, 135 S. Ct. 705 (2014) 17

Keller v. State Bar of California, 496 U.S. 1 (1990) 4, 19, 20

Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401 (2015) 25

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) 3, 4, 18, 21, 23, 24

Locke v. Karass, 555 U.S. 207 (2009) 4, 5, 12, 18, 19

McLane Co. v. EEOC, 137 S. Ct. 1159 (2017)..... 17

McWilliams v. Dunn, 137 S. Ct. 1790 (2017)..... 16

Mollan v. Torrance, 22 U.S. (9 Wheat.) 537 (1824) 14

NASA v. Nelson, 562 U.S. 134 (2011) 18

Pickering v. Board of Educ., 391 U.S. 563 (1968) 18

Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008) 11

Rauner v. AFSCME, Council 31, No. 1:15-cv-01235, 2015 WL 2385698 (N.D. Ill. May 19, 2015).....9, 10, 14, 15

Skelly Oil Co. v Phillips Petroleum Co., 339 U.S. 667 (1950) 9

United States v. United Foods, Inc., 533 U.S. 405 (2001) 20

United States ex rel. Texas Portland Cement Co. v. McCord, 233 U.S. 157 (1914).....11, 13, 14, 15, 16

Yohn v. California Teachers Ass'n, No. 8:17-cv-202-JLS-DFMx, 2017 WL 2628946 (C.D. Cal. June 1, 2017)..... 24

ADMINISTRATIVE DECISIONS

Admin. Law Judge's Recommended Decision and Order, *CMS v. AFSCME, Council 31*, Case Nos. S-CB-16-017 *et al.*, PDF at 28-287 (Ill. Labor Relations Bd. Sept. 2, 2016), *adopted in relevant part*, Decision and Order of the Illinois Labor Relations Board State Panel, PDF at 1-26 (Ill. Labor Relations Bd. Dec. 13, 2016), PDF *available at* https://www.illinois.gov/ilrb/decisions/boarddecisions/Documents/S-CB-16-017bd.pdf..... 6

CONSTITUTION, STATUTES, AND RULES

U.S. Const.:

Art. III 8, 11

Amend. I ..... *passim*

National Labor Relations Act, 29 U.S.C. § 151 *et seq.* 1

5 ILCS 315/6 4

5 ILCS 315/6(d) 3

5 ILCS 315/6(e) 3, 7

Sup. Ct. R. 14.1(a) 5

OTHER MATERIALS

Black's Law Dictionary (10th ed. 2014) 13

Compl., *Keller v. Shorba*, No. 0:17-cv-01965-PJS-DTS, ECF #1 (D. Minn. filed June 8, 2017) 24

First Am. Compl., *Hartnett v. Pennsylvania State Educ. Ass'n*, No. 1:17-cv-00100-YK, ECF #23 (M.D. Pa. filed Mar. 21, 2017) 24

Pet. for Reh'g, *Friedrichs v. California Teachers Ass'n*, No. 14-915 (U.S. filed Apr. 8, 2016), 2016 WL 1445898 5

Preamble to Agreement Between Dep't of Central Mgmt. Servs. and AFSCME, Council 31, AFL-CIO (eff. July 1, 2012), *available at* https://www.illinois.gov/cms/Employees/Personnel/Documents/emp_afscme1.pdf 3

Rauner v. AFSCME, Council 31, No. 1:15-cv-01235 (N.D. Ill.):

Compl. for Decl. J., Dkt. #1 (filed Feb. 9, 2015) 8

Illinois Att'y Gen.'s Mem. in Supp. of Mot. To Dismiss or Stay, Dkt. #55 (filed Mar. 10, 2015) 8, 9

Illinois Att'y Gen.'s Supp. Mem., Dkt. #114 (filed Apr. 30, 2015) 9

Verified Compl. for Decl. & Inj. Relief, *Illinois AFL-CIO v. Rauner*, No. 2015 CH 171 (Ill. Cir. Ct., St. Clair Cnty., filed Mar. 5, 2015) 9

7C Charles Alan Wright et al., *Federal Practice and Procedure* (3d ed. 2007) 11, 13, 15

INTRODUCTION

Forty years ago, in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court confirmed the constitutionality of "fair-share fees" paid to finance the collective-bargaining activities of unions that are obligated under state law to represent both union members and non-members. Petitioner asks this Court to revisit that well-settled conclusion and invalidate a collective-bargaining system that has governed in States and localities across the nation for decades. That request should be denied. Petitioner ignores that, under well-settled principles of federal civil procedure, the federal courts lack jurisdiction to hear this case and erred in permitting it to progress this far. Even if this Court had jurisdiction, moreover, the petition presents no issue worthy of this Court's review. *Abood* was correctly decided, has been repeatedly reaffirmed, and remains undisturbed despite two challenges to its vitality in this Court's last four Terms. If the Court wishes to review *Abood* yet again, it should await a vehicle that presents the question cleanly and on a full record — not one that, as here, lacks any record and is clouded by jurisdictional doubt.

STATEMENT

1. Nearly half the States, and numerous local governments, have adopted labor-relations systems similar to that mandated by the National Labor Relations Act for private-sector employers. In those States, a union selected by a majority of employees must act as the exclusive bargaining representative for all employees and owes a duty to fairly represent all employees within the bargaining unit, without regard to union membership. Fulfilling that representation obligation is not costless: unions employ

lawyers, economists, expert negotiators, and research staff, among others, in their negotiations, contract administration processes, and conducting of adjustment of grievances with public-sector employers. As a result of the negotiating process, unions also engage in costly participatory and cooperative efforts with employers to further the purposes of job training, education, occupational health and safety, and worker retention, among other joint employee-employer endeavors.

To ensure that these bargaining and administrative activities are adequately funded, so-called "agency-shop" jurisdictions authorize the collection of "fair-share fees" from members of the bargaining unit who have opted not to become dues-paying members of the union that has the support of a majority of employees in the unit. These fair-share fees cover those non-members' proportionate share of the costs associated with the essential collective-bargaining responsibilities outlined above, but exclude other expenses unrelated to those responsibilities.

The unions' representative functions — and the fees that make those functions possible — serve the interests of the public employer and the State or locality that adopts such a labor-relations system. By ensuring that the exclusive representatives with which they interact are stable and capable of being effective, the public employers ensure that those unions are credible among the workforce and able to assist in promoting labor peace. Indeed, the most recent collective-bargaining agreement between Illinois and AFSCME reflects the parties' *shared* interests:

> [T]o establish harmonious employment relations through a mutual process, to provide fair and equitable treatment to all employees, to promote

> the quality and continuance of public service, to achieve full recognition for the value of employees and the vital and necessary work they perform, to specify wages, hours, benefits, and working conditions, and to provide for the prompt and equitable resolution of disputes . . . .

Preamble to Agreement Between Dep't of Central Mgmt. Servs. and AFSCME, Council 31, AFL-CIO (eff. July 1, 2012), *available at* https://www.illinois.gov/cms/Employees/Personnel/Documents/emp_afscme1.pdf.

Illinois is among the many state and local governments that have enshrined in state statutory law this collective-bargaining rubric. Under state law, a union selected to be the exclusive representative of a group of public employees is obligated to represent the interest "of *all* public employees in the unit," 5 ILCS 315/6(d) (emphasis added), and an agreement reached through collective bargaining may include "a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective bargaining process," *inter alia*, *id.* § 315/6(e).

2. Laws that authorize fair-share fee payments, like those in Illinois, rest on the principles this Court established in *Abood*, which rejected a challenge to the collection of fair-share fees authorized by Michigan state law. *See* 431 U.S. at 232. In *Abood*, the Court held that state employers may lawfully negotiate the collection of fair-share fees insofar as they finance "collective-bargaining, contract administration, and grievance-adjustment procedures," *id.* — so-called "chargeable" activities.[1] Though such fees

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[1] *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991) ("[C]hargeable activities must (1) be 'germane' to collective-

implicate the First Amendment, the Court explained, collection of the fees is justified by States' strong interest in promoting labor peace through collective bargaining and in avoiding the "free rider" incentive that would arise if non-member employees could avoid paying *any* dues while nevertheless retaining the benefits of representation by an informed and expert negotiator (because the union is obligated to represent "all" employees in a given unit, *e.g.*, 5 ILCS 315/6). *See Abood*, 431 U.S. at 224-26.

This Court has unanimously described *Abood* as "set[ting] forth a general First Amendment principle." *Locke v. Karass*, 555 U.S. 207, 213 (2009); *see also Lehnert*, 500 U.S. at 519 (calling the government ends pursued by agency fee arrangements "vital"). Indeed, *Abood*'s roots extend far deeper than the labor-relations context. The Court has relied on *Abood* to decide the constitutionality of compulsory fees in other contexts beyond labor relations in which organizations collect fees to fulfill public objectives. *See, e.g., Keller v. State Bar of California*, 496 U.S. 1, 16 (1990) (state bar fees); *Board of Regents v. Southworth*, 529 U.S. 217, 230 (2000) (mandatory student association fees); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 558 (2005) (agricultural marketing programs). Moreover, this Court has reaffirmed the core holding of *Abood* no fewer than five times. *See Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) (unanimous); *Lehnert*, 500 U.S. 507; *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177

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bargaining activity; (2) be justified by the government' vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.").

(2007) (unanimous in relevant part); *Locke*, 555 U.S. 207 (unanimous).

A renewed challenge to fair-share fees reached this Court four Terms ago in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), and then again, two Terms ago, in *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016) (per curiam). In each of these cases, this Court declined to overrule *Abood*.[2] And in *Friedrichs*, which was decided by an equally divided Court, the Court also denied a subsequent petition to rehear the case before "a full complement of Justices." Pet. for Reh'g at 1, *Friedrichs v. California Teachers Ass'n*, No. 14-915 (U.S. filed Apr. 8, 2016), 2016 WL 1445898; *see Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 2545 (2016).

3. The collective-bargaining agreement ("CBA") at issue in this case is between the Illinois Department of Central Management Services ("CMS") and respondent American Federation of State, County, and Municipal Employees, Council 31 ("AFSCME" or "the Union"). Under that CBA, AFSCME represents such public employees as corrections officers, firefighters, crime scene investigators, child welfare

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[2] *Friedrichs* also presented a second question whether California's public-school teacher labor-relations system, in which the teachers' union represents and owes a duty to all teachers and is thus authorized to negotiate fair-share fees provisions, may presume non-members do not object to fully supporting the union absent an affirmative notice of objection. That question is not raised here. *See* Pet. i; *see also* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Berkemer v. McCarty*, 468 U.S. 420, 443 n.38 (1984) ("Absent unusual circumstances, we are chary of considering issues not presented in petitions for certiorari.") (citation omitted); *Jones v. United States*, 527 U.S. 373, 394 n.11 (1999).

specialists, maintenance and clerical employees, and many other Illinois public-safety and public-service employees.

Pursuant to the conditions imposed by state law, AFSCME represents those employees — which number in the tens of thousands — in negotiations with the State and its instrumentalities over labor-management issues such as wages, career advancement, overtime, paid time-off, safety and protective equipment (*e.g.*, stab vests and riot gear for corrections officers, or fire protection gear for firefighters), health insurance benefits, disciplinary procedures, and parking. *See generally* ALJ *CMS v. AFSCME* Decision[3] at 18-97. "In the more than 40 years" AFSCME has been bargaining with CMS, the two parties "have reached more than two dozen CBAs with administrations of six different governors, three Democrats and three Republicans." *Id.* at 10. AFSCME has been unable to negotiate a successor CBA with the current administration, however. In addition to negotiating agreements, AFSCME is also responsible for policing and enforcing its CBAs, processing grievances on behalf of employees, and providing representation of individuals in discipline and discharge situations. By law, the Union must provide those services on an equal basis to *all* bargaining unit members without regard to their union membership.

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[3] *See* Admin. Law Judge's Recommended Decision and Order, *CMS v. AFSCME, Council 31*, Case Nos. S-CB-16-017 *et al.*, PDF at 28-287 (Ill. Labor Relations Bd. Sept. 2, 2016) ("ALJ *CMS v. AFSCME* Decision"), *adopted in relevant part*, Decision and Order of the Illinois Labor Relations Board State Panel, PDF at 1-26 (Ill. Labor Relations Bd. Dec. 13, 2016), PDF *available at* https://www.illinois.gov/ilrb/decisions/boarddecisions/Documents/S-CB-16-017bd.pdf.

The contractual terms now in force call for CMS to effect a semi-monthly deduction from the paychecks of the state employees AFSCME represents and to remit the funds to the Union. For Union members, the deduction covers that pay period's portion of the members' dues; for non-members, the deduction is limited to those expenses authorized under state law and this Court's precedents. *See* Pet. App. 13a-14a. The fair-share payment thus reimburses the Union only for "the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment." 5 ILCS 315/6(e).

AFSCME calculates the fair-share fee on the basis of a detailed accounting that identifies the Union's expenditures and excludes all expenses not chargeable under state law. *See* Pet. App. 34a-39a. That accounting is audited by an independent certified public accountant, *see id.* at 37a, 39a, and then reported to represented employees in the Union's "*Hudson* notice." *See Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).[4] AFSCME's *Hudson* notice further provides that every employee charged a fair-share fee is entitled to bring a "challenge[] to the amount of the Fair Share F[]ee" in arbitration. Pet. App. 41a. In such a proceeding, the Union bears the sole "burden of proving that the fair share fee is

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[4] Petitioner incorrectly describes (at 5) the *Hudson* notice in the petition's appendix as listing the "2015 agency fee." That notice "determin[ed] the 2011 fair share fee" and did not remain effective past December 31, 2011. Pet. App. 33a; *see id.* at 34a ("This percentage will remain in effect until the *earlier* of December 31, 2011, or the issuance of a new Notice.") (emphasis added). A new *Hudson* notice with updated calculations is prepared each year.

proper," *id.*, as well as the full cost of the arbitration proceeding.

4. Illinois Governor Bruce Rauner believes fair-share fee legislation is unconstitutional. Accordingly, on February 9, 2015 — the same day his administration began negotiating a successor CBA with the Union — the Governor issued an executive order directing the CMS to suspend the deduction and remittance of fair-share fees and to hold them in escrow. Also on February 9, 2015, the Governor filed a declaratory-judgment complaint in the Northern District of Illinois initiating this litigation against all unions that represent public servants employed by the State, including AFSCME. *See* Compl. for Decl. J., *Rauner v. AFSCME, Council 31*, No. 1:15-cv-01235, Dkt. #1 (N.D. Ill. filed Feb. 9, 2015). The complaint, anticipating (correctly) that unions would sue to enjoin his executive order under state law, alleged that fair-share fees violate the First Amendment and sought a declaratory judgment to that effect. *See id.* ¶¶ 6, 10.

The unions moved to dismiss, and the Attorney General of Illinois intervened on behalf of the State in defense of the state law. In addition to arguing that *Abood* required dismissal on the merits, the defendants argued that the district court lacked Article III jurisdiction because the Governor did "not allege an invasion of *his own* First Amendment rights" and thus lacked standing to sue. Illinois Att'y Gen.'s Mem. in Supp. of Mot. To Dismiss or Stay at 7, *Rauner*, Dkt. #55 (N.D. Ill. filed Mar. 10, 2015). The defendants further argued that Governor Rauner had not properly invoked the district court's federal-question jurisdiction because his First Amendment argument arose only as an anticipated *defense* to a

suit by the unions seeking to compel the withholding of fair-share fees under *state* law. *See id.* at 5-6. The Governor's suit thus did not arise under federal law under the well-pleaded complaint rule. *See Skelly Oil Co. v Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950).[5]

While the motions to dismiss the Governor's lawsuit were pending, petitioner Mark Janus and two other non-union state employees (Marie Quigley and Brian Trygg) (collectively referred to hereinafter as the "Employees") sought leave to intervene as plaintiffs. The Illinois Attorney General opposed the intervention, arguing that the district court's lack of jurisdiction over the case precluded it from deciding — much less granting — the Employees' motion to intervene. *See* Illinois Att'y Gen.'s Supp. Mem. at 7-8, *Rauner*, Dkt. #114 (N.D. Ill. filed Apr. 30, 2015).

On May 19, 2015, the district court ruled that Governor Rauner lacked standing to sue and had failed to raise a federal question. *See Rauner v. AFSCME, Council 31*, No. 1:15-cv-01235, 2015 WL 2385698 (N.D. Ill. May 19, 2015). The court agreed that the Governor had "no personal interest at stake" in the lawsuit and that his complaint had raised no federal question (other than the anticipated constitutional defense). *Id.* at *2-3. It thus granted the defendants' motions to dismiss the case.

In the same order, the district court granted the Employees' motion to intervene. *See id.* at *5. The court acknowledged the general rule that "a party cannot intervene if there is no jurisdiction over the

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[5] The unions ultimately sued Governor Rauner in state court to challenge his executive order. *See* Verified Compl. for Decl. & Inj. Relief, *Illinois AFL-CIO v. Rauner*, No. 2015 CH 171 (Ill. Cir. Ct., St. Clair Cnty., filed Mar. 5, 2015).

original action." *Id.* at *4. Its lack of jurisdiction meant it "ha[d] no power" to grant the motion to intervene; it could not "allow the Employees to intervene in the Governor's original action because there is no federal jurisdiction over his claims." *Id.*; *see also id.* ("'An existing suit within the court's jurisdiction is a prerequisite of an intervention . . . .'") (quoting *Hofheimer v. McIntee*, 179 F.2d 789, 792 (7th Cir. 1950)). Despite those settled principles, the court observed that "some courts" have held that a court may "treat pleadings of an intervener as a separate action" in order to reach those claims on the merits, and it granted the motion to intervene on that basis. *Id.* at *4-5.

After granting the Employees' motion to intervene, the district court granted the unions' motion to dismiss the action on the merits under *Abood*. *See* Pet. App. 6a-7a.

5. On appeal, the Seventh Circuit acknowledged the awkward posture of the case. It observed that the district court, "[w]hile dismissing the governor's complaint for lack of standing, . . . granted the employees' motion to intervene" even though, "[t]echnically, of course, there was nothing for Janus and Trygg to intervene in." Pet. App. 3a. With respect to Janus, however,[6] the court nevertheless reached the merits and affirmed the district court. It reasoned that allowing the intervention despite the lack of subject-matter jurisdiction was "the efficient approach." *Id.*

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[6] The court of appeals affirmed the dismissal of Trygg's lawsuit on the grounds that his claim was precluded. *See* Pet. App. 3a-4a. Quigley, the third original intervenor, had dropped out of the lawsuit while it was pending in the district court.

REASONS FOR DENYING THE PETITION

I. Because of the way this lawsuit originated, the federal courts — and this Court — lack subject-matter jurisdiction to decide the question presented. There is no dispute that Governor Rauner's lawsuit challenging Illinois' fair-share-fee statute failed to allege an Article III injury or raise a federal question. Because the district court lacked jurisdiction over that initial lawsuit, it also lacked jurisdiction when petitioner moved to intervene in that jurisdictionally defective lawsuit. As this Court has long held, where a court lacks jurisdiction over a filed action, intervention cannot "cure th[at] vice in the original suit." *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 163-64 (1914); *see* 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1917, at 581-82 (3d ed. 2007) ("Wright & Miller") (intervention "presupposes the pendency of" a properly filed lawsuit and "cannot create jurisdiction if none existed before").

The lower courts in this case excused this jurisdictional defect as a mere "[t]echnical[ity]," following the lead of "some [other] courts" that have recognized an exception to *McCord*'s bright-line rule. But it was erroneous for the lower courts to carve out an unauthorized exception to this Court's clear holding. Moreover, at a minimum, the uncertainty regarding the Court's jurisdiction makes certiorari inappropriate in this case, where petitioner has not asked for review of a threshold issue that the Court would need to resolve before reaching the question presented. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008) ("[W]e bear an independent obligation to assure ourselves that jurisdiction is proper before proceeding to the merits.").

Granting certiorari on the issue raised in the petition in this posture needlessly runs the risk that the case will ultimately be dismissed for lack of jurisdiction or as improvidently granted.

II. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), was, in all events, correctly decided, and there is no reason to reconsider its vitality once again. The core holding of *Abood* has been repeatedly — and unanimously — reaffirmed in the 40 years since it was decided. Moreover, *Abood*'s "general First Amendment principle," *Locke v. Karass*, 555 U.S. 207, 213 (2009), underlies this Court's analysis of obligatory fees in numerous contexts beyond labor relations. Most recently, this Court reaffirmed *Abood* by an equally divided Court just two Terms ago, and it denied a petition requesting that the case be reheard before a full nine-Justice Court. *Abood* is settled law and should remain so.

III. Even if the jurisdictional defects in this case were ignored, and reconsideration of *Abood* were warranted, the petition should be denied. This petition challenges *Abood*'s core holding without the benefit of any factual record. A record is necessary to fully explore the limited degree of interference with First Amendment interests and the ways in which fair-share fees further the valid state interests that *Abood* and subsequent cases have identified. Petitioner points to no urgent need preventing this Court from awaiting a proper case, accompanied by a full record and unburdened by this case's jurisdictional cloud.

I. THIS COURT LACKS JURISDICTION TO DECIDE THE QUESTION PRESENTED

A. This Court should deny certiorari because the lower courts lacked subject-matter jurisdiction over petitioner's case under well-settled principles that petitioner does not ask this Court to overrule. As a general rule, "[i]ntervention cannot cure any jurisdictional defect that would have barred the federal court from hearing the original action," because intervention "presupposes the pendency of" a properly brought lawsuit. 7C Wright & Miller § 1917, at 581. "This is no casual observation." *Disability Advocates, Inc. v. New York Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 160 (2d Cir. 2012). Rather, this principle "reflects the Supreme Court's long-held understanding that where a 'cause of action ha[s] not accrued to the [party] who undertook to bring the suit originally . . . intervention [can]not cure th[e] vice in the original suit.'" *Id.* (quoting *McCord*, 233 U.S. at 163-64) (alterations in *Disability Advocates*).

In *McCord*, this Court considered whether the intervention of plaintiffs whose suit was timely under the jurisdictional provisions of a 1905 public works statute could create jurisdiction over a suit that was premature and thus not subject to federal-court jurisdiction under that act. *See* 233 U.S. at 160. Although the intervenors filed a "complete bill," *id.* at 158-59 — *i.e.*, a valid complaint[7] that would have been properly filed on its own — this Court held that the underlying suit was jurisdictionally deficient and that "[t]he intervention could not cure this vice

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[7] *See Black's Law Dictionary* 194 (10th ed. 2014) (defining "bill" as "[a] formal written complaint, such as a court paper requesting some specific action for reasons alleged").

in the original suit." *Id.* at 163; *see also id.* (right to intervene "presuppose[s] an action duly brought").[8]

McCord is no outlier. Rather, it rests on an even more fundamental principle: "that 'the jurisdiction of the court depends upon the state of things *at the time of the action brought.*' This time-of-filing rule is hornbook law (quite literally) taught to first-year law students in any basic course on federal civil procedure." *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 570-71 (2004) (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824)) (emphasis added, footnote omitted). That rule is strictly applied, "regardless of the costs it imposes," *id.* at 571, and is dispositive here. The district court had no jurisdiction to consider the intervention motion because it had no jurisdiction over the action starting from "the time . . . the action [was] brought." *Id.* at 570.

The district court recognized, but ignored, its lack of jurisdiction. After Governor Rauner brought suit on his own behalf, the court ruled that it lacked subject-matter jurisdiction because the Governor lacked standing to sue, *see Rauner*, 2015 WL 2385698, at *3 (Governor "is not subject to the fair share fees requirement" under challenge and thus "has no personal interest at stake"), and failed to raise a federal question, *see id.* at *2. The court acknowledged that it could not allow Janus (and his since-dismissed co-plaintiffs Trygg and Quigley) "to intervene in the

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[8] The *McCord* Court also observed that the intervenors' suit could not be "treated as an original suit" because "[n]o service was made or attempted . . . as required by the statute." 233 U.S. at 164. But the Court did not say that, had service been effected, retaining jurisdiction over the underlying lawsuit would have been proper.

Governor's original action because there is no federal jurisdiction over his claims" and "the Employees' intervention cannot 'cure' the problem with the original complaint." *Id.* at *4.

The district court nevertheless invoked an exception adopted by "some courts," and it granted the motion to intervene by treating the intervening plaintiffs' claims "as a separate action." *Id.* The Seventh Circuit, though agreeing there was no valid suit "for Janus and Trygg to intervene in," nonetheless dismissed the jurisdictional issue as a "[t]echnical[ity]" and affirmed on the rationale that permitting intervention would be "the efficient approach." Pet. App. 3a. Under *McCord* and longstanding principles of civil procedure, the district court and the court of appeals erred in failing to dismiss this case.

It is true that some (but not all) courts have recognized an exception to *McCord* that permits an intervening plaintiff with an independent basis for jurisdiction to be treated as if he is bringing an independent lawsuit. *See* 7C Wright & Miller § 1917, at 582-83 (suggesting a court's "discretion" to treat some intervention "as a separate action"). Such an exception is inconsistent with *McCord*, however. Indeed, if the exception the lower courts have identified existed, *McCord* itself would have been the quintessential case for applying it. There, the would-be intervenors had filed a "complete bill" within the proper statutory period for doing so, 233 U.S. at 158-59, just as the intervenors' claims here purportedly provided an "independent basis" for jurisdiction, *Rauner*, 2015 WL 2385698, at *4. This Court held that the intervention was nevertheless improper in the absence of an existing "action duly brought." 233 U.S. at 163. Under *McCord* and long-settled

principles of federal civil procedure, therefore, dismissal of the action below was required and this petition should be denied.

B. At the very least, the lower courts' jurisdictional holdings make this case a poor vehicle to resolve the question presented, because granting certiorari would require the Court to grapple with a complex threshold jurisdictional question regarding the existence and scope[9] of any exception to *McCord*. Moreover, this Court would face that slate of issues without the benefit of informed analysis by the court of appeals.

The panel below was the first in the Seventh Circuit to embrace the exception to *McCord*, and it did so in a single paragraph without the benefit of adversarial briefing by the parties. *See* Pet. App. 3a; *see also Bragdon v. Abbott*, 524 U.S. 624, 655 (1998) (remanding to provide court of appeals opportunity to reconsider "issue through the adversary process"); *McWilliams v. Dunn*, 137 S. Ct. 1790, 1807 (2017) (Alito, J., dissenting) ("adversarial briefing . . . helps the Court reach sound decisions"). In doing so, the Seventh Circuit may have created an intra-circuit

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[9] Even if a *McCord* exception exists, sound policy reasons support carefully examining and limiting the scope of any exception to the traditional time-of-filing rule. Writing for the panel in *Disability Advocates*, Judge Cabranes expressed the concern that allowing "curative interventions" too late in the proceedings "would allow the . . . exception . . . to swallow the clearly-established constitutional rule that intervention cannot cure any jurisdictional defect that would have barred the federal court from hearing the original action." 675 F.3d at 161. In addition, such an exception would have to be crafted to guard against judge-shopping concerns. An exception to the bright-line time-of-filing rule would allow plaintiffs to intervene if they like the district judge in the jurisdictionally defective case or to file a separate lawsuit if they prefer to avoid that judge.

conflict,[10] another factor militating against certiorari. *See Joseph v. United States*, 135 S. Ct. 705, 707 (2014) (statement of Kagan, J., respecting denial of certiorari) ("we usually allow the courts of appeals to clean up intra-circuit divisions on their own").[11]

These complex threshold issues — which are addressed neither by petitioner nor by any *amicus* — render this case a poor vehicle for raising in isolation the question whether *Abood* should be overruled. This Court should leave "full exploration," *Bragdon*, 524 U.S. at 655, of these unresolved jurisdictional issues to the court of appeals in the first instance. *See McLane Co. v. EEOC*, 137 S. Ct. 1159, 1170 (2017) (Supreme Court is "a court of review, not of first view").

II. *ABOOD* WAS CORRECTLY DECIDED, AND FURTHER REVIEW IS UNWARRANTED

Even assuming this Court could reach the merits of the petition, certiorari should be denied because there is no need to reconsider *Abood*.

A. *Abood*'s rule is sound and underlies important and longstanding tenets of this Court's First Amendment jurisprudence. At its core, *Abood* acknowledged that certain labor-relations interests justify the small intrusion on employees' First Amendment interests that fair-share payments represent. That

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[10] *See Hofheimer v. McIntee*, 179 F.2d 789, 792 (7th Cir. 1950) ("[I]ntervention is ancillary and subordinate to the main cause and whenever a suit ceases to exist by virtue of dismissal by the court, there remains no longer any action in which there can be intervention."); *Brooks v. Walls*, 279 F.3d 518, 522 (7th Cir. 2002) ("One panel of this court cannot overrule another implicitly.")

[11] Petitioner did not file a petition for rehearing en banc in the Seventh Circuit.

holding is entirely consistent with the "crucial" constitutional distinctions "between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 598 (2008) (quoting *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 896 (1961)) (alteration in original). As this Court has long recognized, "the Government has a much freer hand in dealing 'with citizen employees than it does when it brings its sovereign power to bear on citizens at large.'" *NASA v. Nelson*, 562 U.S. 134, 148 (2011) (quoting *Engquist*, 553 U.S. at 599). *Abood*'s authorization of fair-share agreements falls safely within the government's broader authority to regulate speech when it acts as an employer. The constitutional balance struck in *Abood* accords with the balancing test for considering the employment-related First Amendment claims of public employees that was established in *Pickering v. Board of Education*, 391 U.S. 563 (1968).

This Court also repeatedly has reaffirmed *Abood*'s core rationale that "the government interest in labor peace is strong enough to support an 'agency shop' notwithstanding its limited infringement on nonunion employees' constitutional rights." *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302-03 (1986) (footnote omitted); *see also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) (unanimously reaffirming *Abood*'s basic holding that employees may be required to pay their share of the expenses of the exclusive representative's collective-bargaining activities); *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007) (same); *Locke v. Karass*, 555 U.S. 207 (2009) (unanimous).

Indeed, just eight years ago, this Court unanimously described *Abood* as establishing a "general First Amendment principle" that the government may "require both public sector and private sector employees who do not wish to join a union designated as the exclusive collective-bargaining representative at their unit of employment to pay that union a service fee [for collective-bargaining activities] as a condition of their continued employment." *Locke*, 555 U.S. at 213. It then (unanimously) found that the litigation expenses at issue were germane to collective bargaining and thus chargeable consistent with the First Amendment.

B. Outside the union-dues context, this Court likewise repeatedly has recognized *Abood* for the principle that, where the government is constitutionally permitted to advance valid government interests through private associations (*e.g.*, state bars), it may also oblige the beneficiaries to share the cost of supporting the endeavor's core purpose. Indeed, to our knowledge, *Abood* has framed the analysis of every case involving a First Amendment challenge to a law requiring obligatory cost-sharing since *Abood* was decided in 1977.

In *Keller v. State Bar of California*, 496 U.S. 1 (1990), this Court held unanimously that, just as exclusive representation is justified by the State's interest in stable labor relations, "the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13-14. The Court applied *Abood*'s free-rider rationale to "all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts" even though "members of the State

Bar concededly do not benefit as directly from its activities as do employees from union negotiations with management." *Id.* at 12. As in *Abood*, given the State's valid justifications for creating the association, the "State Bar may . . . constitutionally fund activities germane to those goals out of the mandatory dues of all members." *Id.* at 13-14.

The Court also adopted *Abood* as the governing standard in a series of agricultural marketing cases. *See Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 472-73 (1997) (reaffirming *Abood*'s holding that "assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group" as long as the funds are "'germane' to the purpose for which compelled association was justified"). In each such case, the Court applied *Abood*'s holding and standard to the particular program at issue. *See id.* at 473 (generic advertising was "unquestionably germane to the purposes" of the marketing association, and the financial assessments "are not used to fund ideological activities"); *United States v. United Foods, Inc.*, 533 U.S. 405, 415 (2001) (mushroom advertisements did not satisfy *Abood*'s "germane[ness]" test because "the compelled contributions for advertising [were] not part of some broader regulatory scheme"); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 558 (2005) (describing *Abood* and *Keller* as "controlling").

Finally, in *Board of Regents v. Southworth*, 529 U.S. 217 (2000), the Court again reaffirmed the "constitutional rule" of *Abood* and *Keller* as "limiting the required subsidy to speech germane to the purposes of the union or association." *Id.* at 231; *see id.* at 230-33 (taking *Abood* and *Keller* as the "beginning point" of the analysis but permitting

universities broader leeway to mandate fees because of special considerations attendant to student extracurricular activities notwithstanding First Amendment implication).

C. Recent decisions have likewise left *Abood* undisturbed. After having declined an invitation to overrule *Abood* in *Harris v. Quinn*, 134 S. Ct. 2618, 2638 n.19 (2014), this Court again considered *Abood* just two Terms ago, affirming the decision below by an equally divided Court, *see Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016) (per curiam). Notably, the Court refused to grant the petitioner's request to rehear *Friedrichs* so that a full complement of nine Justices could hear that case and break the 4-4 tie. *See supra* p. 5.

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In all, since *Abood* was decided more than 40 years ago, 17 Justices — including eight Members of the current Court, Chief Justice Rehnquist, and Justices Brennan, Stewart, White, Marshall, Stevens, O'Connor, Scalia, and Souter — have authored or joined opinions recognizing *Abood*'s key principle and applying it as the governing rule in cases involving First Amendment challenges to union dues or other cases involving the obligation to share the costs of efforts by private associations to further collective state aims. As that consensus reflects, *Abood* correctly held that the "vital policy interest[s]" of public employers in fairly allocating the costs of the services provided by the union outweigh the comparatively modest limitations on public employees' expressive freedom. *Lehnert*, 500 U.S. at 519. *Abood* is settled law.

III. THIS IS AN UNSUITABLE VEHICLE FOR RECONSIDERING *ABOOD* IN ANY EVENT

Even if it were necessary to consider for a third time whether to overrule *Abood*, this would not be a proper case in which to do so. In addition to serious doubts about the federal courts' jurisdiction to hear this case, *see supra* Part I, this case provides a poor vehicle for reconsidering *Abood* because it is utterly devoid of any factual record. Moreover, petitioner identifies no urgent need for review that would prevent the Court from awaiting a case that presents the same question cleanly and fully, and with an appropriate factual record.

A. The district court dismissed the intervenor-plaintiffs' complaint on the merits before the development of any factual record and before the filing of any answer by the defendants. That counsels against review here because the doctrinal foundations of *Abood* and its progeny implicate substantial factual questions.

As the *Harris* majority recognized, the vitality of *Abood* implicates "administrative" efforts to separate chargeable and non-chargeable expenditures, "practical" considerations facing non-members wishing to challenge a fair-share-fee calculation, and the "empirical assumption" that fair-share fees support effective exclusive representation. 134 S. Ct. at 2633-34. It is impossible to assess the validity of these concerns in a vacuum. Different uses of fair-share fees will implicate a plaintiff's First Amendment interests in different ways, which will affect any constitutional claim of harm. Likewise, the long-standing and accepted conclusion that fair-share payments facilitate the State's various recognized interests in fostering "labor peace," *Abood*, 431 U.S.

at 224, and compensating unions for "mandated free-ridership," *Lehnert*, 500 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part), is best tested on a factual record, too.

For example, record evidence in this case could have allowed for a full exploration of how and to what extent Illinois' agency-shop system supports and facilitates recruitment and retention among police and emergency responders; ensures appropriate protective equipment and medical benefits for police, firefighters, and corrections officers; or ensures proper and thorough training to criminal forensic scientists, fire safety inspectors, or child protection associates and child welfare specialists. Fair-share fees may be used to advance all of those purposes.

Likewise, with respect to the "labor peace" rationale, a factual presentation would have clarified to the Court the tangible ways that fair-share fees and the Union's exclusive representation further that compelling state aim. Such a record would illustrate the efficiencies generated by negotiating with a single, well-informed representative and the benefits that accrue to non-Union members (to say nothing of the State and its citizens) from a properly trained, properly cared for, and properly represented public workforce.

Moreover, to the extent the Court may reexamine or modify the holding in *Abood*, a factual record would be essential. Determining precisely which fair-share payments are constitutional will necessitate, as this Court's cases have required, a "fact-sensitive and deferential weighing of the government's legitimate interests." *Board of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 677-78 (1996). For example, in *Lehnert*, the Court carefully consid-

ered the competing interests of the government as public employer and of objecting fee payers in holding that a narrow range of union lobbying activities was chargeable. *See* 500 U.S. at 519-22 (plurality). No such "fact-sensitive" weighing would be possible here, given petitioner's assertion that any payment for whatever purpose violates his First Amendment rights.

B. Awaiting a case with a proper factual record would not cause undue delay, and petitioner identifies no urgent need to reach the question presented *now* — particularly in a factual vacuum.

As the last few years demonstrate, plaintiffs routinely bring challenges to state fair-share statutes. *See, e.g.*, Compl. ¶ 1, *Keller v. Shorba*, No. 0:17-cv-01965-PJS-DTS, ECF #1 (D. Minn. filed June 8, 2017) ("This suit seeks to overturn *Abood v. Detroit Board of Education* . . . ."); First Am. Compl. ¶ 7, *Hartnett v. Pennsylvania State Educ. Ass'n*, No. 1:17-cv-00100-YK, ECF #23 (M.D. Pa. filed Mar. 21, 2017) ("Plaintiffs seek the Supreme Court's review of the constitutionality of its holding in *Abood*").[12] And not all of these vehicles progress through the federal courts in the absence of a useful factual record. For example, the district court in *Yohn v. California Teachers Ass'n*, No. 8:17-cv-202-JLS-DFMx, 2017 WL 2628946 (C.D. Cal. June 1, 2017), denied the plaintiffs' pre-answer motion for judgment on the pleadings (against themselves) and appears likely to decide the constitutional question "following development of a factual record." *Id.* at *9-10. That sort of litigation posture would equip an appellate court

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[12] The plaintiff in the *Hartnett* litigation in Pennsylvania also joined an *amicus* brief in support of the petition here. *See* Br. Amicus Curiae of Pacific Legal Found. et al.

to resolve the many fact-bound issues that underlie *Abood* and that accompany reconsideration of settled precedent. *See, e.g.*, *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015) (identifying "unworkability" as a factor relevant to the force of *stare decisis*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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